

No. 05-697 NOV 29 2005

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In The
Supreme Court of the United States

FU-CHIANG TSUI,

Petitioner,

v.

TSAI-YI YANG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the *Younger* abstention doctrine and the *Colorado River* abstention doctrine apply to international child abduction cases involving the Hague Convention on the Civil Aspects of International Child Abduction.
2. If the *Younger* abstention doctrine and the *Colorado River* abstention doctrine apply to international child abduction cases, then whether federal courts should abstain from conducting a Hague Convention proceeding when there is an ongoing state custody proceeding with which the federal proceeding will interfere.

PARTIES TO THE PROCEEDINGS

Petitioner, Fu-Chiang Tsui, was the respondent-appellee below and is referred to as "Petitioner" herein. Respondent, Tsai-Yi Yang, was the petitioner-appellant below and is referred to as "Respondent."

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Honorable Court that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Third Circuit (referred to as the "Third Circuit Court of Appeals" herein) published at 2005 U.S. App. LEXIS 15943.

CITATIONS TO OPINIONS BELOW

The original Opinion of the Third Circuit Court of Appeals is annexed hereto and reported at 2005 U.S. App. LEXIS 15943 (App. 1a). The Third Circuit Court of Appeals reversed the Order of Court of the U.S. District Court for the Western District of Pennsylvania entered on November 19, 2003, which dismissed Respondent's Petition for Return of Child and denied the Motion for Stay (App. 16a). Petitioner filed a Petition for Rehearing on August 17, 2005. On August 31, 2005, the Third Circuit Court of Appeals denied said Petition (App. 21a).

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The Third Circuit Court of Appeals issued its original Opinion and Judgment on August 3, 2005. Following Petitioner's timely Petition for Rehearing, the Third Circuit Court of Appeals denied said Petition on August 31, 2005. This Petition for Writ of Certiorari is timely filed within ninety days of the denial of the Petition for Rehearing. Jurisdiction is invoked under 28 U.S.C.S. § 1254(1).

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved in this case are annexed hereto (App. 23a).

CONCISE STATEMENT OF THE CASE

Petitioner and Respondent are the biological parents of Raeann (referred to as "Daughter" or "Child" herein). The Child was born on June 11, 1996 in Pittsburgh, Pennsylvania, United States. The Child is a citizen of the United States.

Subsequently, Respondent relocated with the Child (without Petitioner) to Taiwan and then to Canada. Later Respondent developed a disabling disease called Thymoma; she was also diagnosed with Myasthenia Gravis. In the Fall of 2002, Respondent's condition became nearly fatal.

Knowing she might die, Respondent asked Petitioner to take care of the Child. No child custody court order existed at the time. With Respondent's consent, the Child started living with Petitioner and his family in Pittsburgh, Pennsylvania, United States, on or around October 25, 2002.

As no child custody order existed, Petitioner initiated a custody action in the Court of Common Pleas of Allegheny County, Pennsylvania, United States (referred to as the "State Court" herein), on December 11, 2002. Respondent ignored this child custody proceeding. The State Court issued an Interim Order of Court on February 6, 2003, granting Petitioner

full custody of the Child and reserving Respondent's right to reinstate custody proceedings once she regained her health and desired to pursue custody (App. 20a). Meanwhile, after Petitioner had commenced a child custody action in Pennsylvania and after Respondent refused to participate, Respondent filed for custody in Canada. Respondent then acquired a similar court order from the Supreme Court of British Columbia, Canada, granting her interim custody of the Child (App. 18a). Respondent misled the Canadian court by informing said court that custody proceedings were not pending elsewhere.

Using the above Canadian custody order, Respondent sought return of the Child to Canada, by filing in a U.S. federal district court. Specifically, she filed a Petition for Return of Child to Petitioner (referred to as a "Hague petition" herein) in the United States District Court for the Western District of Pennsylvania (referred to as the "District Court" herein). Her argument was that Petitioner was violating an international treaty by keeping the Child in the United States. Specifically, she argued that Petitioner violated the Hague Convention on the Civil Aspects of International Child Abduction (referred to as the "Hague Convention" herein). Respondent also filed a separate Request to Stay, asking the District Court to stay the custody proceedings pending in State Court in Pennsylvania. Said Petition for Return of Child was dismissed, and the Request to Stay was denied by an Order of the District Court of November 19, 2003 (App. 16a).

The District Court held that it lacked jurisdiction to decide this treaty issue, and deferred to the Pennsylvania State Court to decide it (where custody proceedings were pending).

Respondent appealed to the Third Circuit Court of Appeals, arguing that the District Court had jurisdiction to decide the treaty issue. The Third Circuit reversed the Order of the District Court, held that the District Court had jurisdiction, and instructed the latter to proceed on the merits of the treaty issue. (App. 1a). The Third Circuit Court of Appeals denied Petitioner's Petition for Rehearing (App. 21a)¹, and this Petition for Writ of Certiorari followed.

Since caring for the Child, Petitioner has helped eliminate the Child's skin ailment and improve her grades. The Child is living with her two half-brothers, and enjoys a much higher standard of living in Petitioner's care. Respondent has very regular phone contact with the Child, and continues to fight her serious cancer. Respondent still refuses to participate in custody proceedings in Pennsylvania State Court, so Petitioner's full custody remains unchanged.

¹ One basis for asking for rehearing was that 28 U.S.C.S. § 46(b) and (c) require a panel of three judges must hear and determine a case in the U.S. Court of Appeals. In the instant case, only two judges filed the Opinion as the third judge retired beforehand, which violates both the above statute and *Khanh v. United States*, 539 U.S. 69.